Appendix

OPINION OF THE COURT BELOW

United States Court of Appeals
for the Ninth Circuit

No. 14,706—May 23, 1956

Pacific Far East Lines, Inc., a Corporation,
Appellant,

vs.

John Williams,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division

Before: Healy, Lemmon and Fee, Circuit Judges
Healy, Circuit Judge

This is an appeal from a judgment for appellee, a longshoreman, in a suit for damages for personal injury predicated on negligence of appellant and on unseaworthiness of its refrigerator ship Fleetwood. The case was tried to a jury, which returned a general verdict for appellee.

The longshore gang which was engaged in loading the Fleetwood had knocked off work at midnight for lunch. Before leaving they closed up the No. 5 hatch with heavy insu-

lation plugs to keep the hold from heating while away. About 1 A.M. they returned to resume loading. In order to remove the insulation plugs appellee and another longshoreman climbed down onto the plugs and hooked the key plug to a wire sling connected with the cargo winch. The two men then got out of the way, appellee by leaving the hatch. The winch lifted the plug and carried it over to the inshore deck where it was deposited. Appellee then started to climb over the coaming to hook up the next plug. He stepped back and down with one foot, seeking to step onto a bar affixed within a recess in the coaming above the space where the plug had been. He slipped, fell through the opening in the hatch left by the removal of the key plug, and landed on cargo stowed in the lower hold, suffering serious injury.

There was testimony that moisture and frost had formed on the hatch coaming and its recessed steps, from which the jury were entitled to infer that appellee's plunge into the hold was precipitated by his slipping on this treacherous surface. The evidence for appellee tended strongly to show that the lighting above the plugs was insufficient to disclose the existence of the hazardous condition described. This evidence we summarize briefly.

A large canvas known as a "Seattle tent" was suspended above the hatch to keep warm air from raising the temperature in the hold. Some light from a floodlight attached to the mast penetrated a narrow slit in this canvas. Also there was some light which emanated from cargo lights resting on the deck or propped against the hatch coaming, and some which came from the dock lights. There was testimony that the small lights attached to the 'tween deck overhead, for illuminating the 'tween deck hold, were not turned on at this time. These lights are under the control of the ship's officers and are supposed to be on at all times; and the jury might

well have inferred that had they been on they would have cast sufficient illumination on the hatch coaming to help substantially in revealing to appellee the slippery condition of the surface on which he was about to step.

In this state of the proof on appellee's behalf the jury were not unwarranted in finding unseaworthiness or negligence, or both, on the part of the shipowner. The instructions given them by the court were thorough and informative, and there appears to be no good reason why we should disturb their verdict.

Appellant, citing Cookingham v. United States, 3 Cir., 184 F.2d 213, argues that the presence of ice in the area or the slippery condition of the coaming was a "transitory" condition, not constituting unseaworthiness or negligence on the part of the ship. Assuming the doubtful proposition that the *Cookingham* holding is recognized in this circuit as persuasive authority, we see no analogy between it and the case before us. In *Cookingham* the injured seaman, a cook, slipped on some "jello" while going down a stairway. There was no evidence tending to connect the ship with the presence of the jello on the stairway, and apparently none tending to show that the stairway was insufficiently lighted. Here, however, as already seen, there was evidence of a condition, *attributable to the ship*, of insufficient lighting which might well be thought to have been responsible for appellee's mishap. Even though the condition of inadequate lighting be regarded as "transitory", that fact would obviously not serve to absolve appellant of liability.

Affirmed.

(Endorsed:) Opinion. Filed May 23, 1956.

Paul P. O'Brien, Clerk.

COMPLAINT IN DISTRICT COURT

United States Court for the Northern District of California, Southern Division

No. 33146

John Williams,
Plaintiff,
vs.
Pacific Far East Lines, Inc., a Corporation,
Defendant.

Second Amended Complaint for Damages

Plaintiff John Williams complains of defendant that:

I.

This is an action of a stevedore under the applicable civil and maritime laws of the United States pertaining to actions by stevedores engaged in maritime pursuits. The action is brought upon the law side of this Honorable Court and demand for trial by jury is respectfully made.

II.

At all times relevant herein, defendant Pacific Far East Lines, Inc., was and is a corporation, incorporated, organized and existing under and by virtue of the laws of the State of California, and doing business in and under the laws of said state; that plaintiff John Williams is a citizen of the State of California, resident in the City and County of San Francisco, said State being within the jurisdiction of

this Honorable Court; that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

III.

At all times relevant herein, defendant Pacific Far East Lines, Inc., a corporation, did manage, control, operate and own that certain vessel the "S. S. Fleetwood" upon which vessel plaintiff herein was injured.

IV.

At all times herein relevant, plaintiff John Williams was a longshoreman employed by Pacific Maritime Association for West Coast Terminals which company agreed to and did furnish the defendant Pacific Far East Lines, Inc., with stevedores and longshoremen for the purpose of loading the said "S. S. Fleetwood" at Alameda Air Base, Oakland, California; that pursuant to the agreement aforesaid, plaintiff was aboard the said vessel on the 29th day of October, 1952, at the express invitation of defendants; and within the course and scope of his employment and in discharge of his duties.

V.

On the 29th day of October, 1952, at or about 1:15 a.m., plaintiff, while in the course of his employment and at the express invitation of defendants herein, as aforesaid, and while working as a hole man in hatch #3 and/or #4 or #5 of said vessel aforesaid, loading cold storage, was caused to and did fall in one of said open hatches, by reason of the negligence of the defendants and the unseaworthiness of said vessel at the aforesaid time, place and hour, sustaining permanent disabling injuries, consisting of the following:

1. Both wrists broken.
2. Fractured ribs, knee and ankle.

3. Loss of teeth.

4. Left eye affected.

5. Concussion.

6. Contusions, abrasion, lacerations and scarring in and about the body.

7. Excruciating pain, shock and suffering, and other injuries not presently diagnosed, the allegations of which plaintiff prays leave to insert by amendment when ascertained.

8. On information and belief, plaintiff alleges that by reason of and as a result of the breaking and fractures of his wrists, as aforesaid, he will never again be able to pursue his trade of longshoreman.

VI.

That at the times herein mentioned, defendant owed plaintiff the duty of providing a safe ship, place, in which to work; and defendant negligently failed to do so; that the aforesaid injuries, sustained by virtue of the incident hereinabove more fully set forth, were proximately caused by reason of the negligence of the defendant Pacific Far East Lines, Inc., its masters, officers, agents, servants and employees in the management, control and operation of the "S. S. Fleetwood" at the aforesaid time, place and hour, for reason that the said defendant negligently:

1. Failed to provide plaintiff with a safe and proper place to work while he was aboard said vessel.

2. Failed to provide plaintiff with competent and efficient supervisory employees of the defendant, then and there charged with the safety, control and management of said vessel.

3. Failed to warn plaintiff of the dangers to be encountered by virtue of the failure of defendant to erect and

maintain proper safeguards, guard lines, guard rails, guard chains and the like around the said number 3 and/or 4 or 5 hatches aboard said vessel.

4. Failed to erect and maintain proper safeguards, guard lines, guard chains, guard rails, and the like for the protection of persons lawfully aboard said vessel and within the course and scope of their employment in and about said number 3 and/or 4 or 5 hatches of said vessel.

5. Failed to provide safe and proper lighting in and about said number 3 and/or 4 or 5 hatches and in the areas adjacent thereto.

VII.

That prior hereto, and on the 26th day of October, 1953, plaintiff executed a "Notice of Election to Sue" and herein pursuing remedies against third parties, the defendants herein, pursuant to Section 33 of the Longshoremen and Harbor Workers Compensation Act.

VIII.

Solely by reason of the premises, plaintiff has required, and will in the future require the services of hospitals, physicians, surgeons, medical specialists, roentgenologists, nurses and the like to his damage in a presently unascertained amount, the allegations of which he prays leave to insert by amendment when ascertained.

IX.

At the time of the aforesaid injury, plaintiff was a healthy, vigorous family man and a competent stevedore aged about 45 years, capable of earning and earning approximately $400.00 per month, plus overtime; that solely by reason of the premises and as a proximate consequence thereof, plaintiff was unemployed to his damage in the sum of approximately $4,000.00 and plaintiff is informed and

believes, and therefore alleges that he will be unemployable in his present trade in the future, to his damage in a presently unascertained amount, the allegations of which he prays leave to insert by amendment when ascertained.

X.

Solely by reason of the premises, plaintiff has been generally damaged in the sum of $150,000.00.

Second Cause of Action of John Williams

As and for a Second distinct and separate cause of action, plaintiff complains of defendant that:

I.

Realleges, as if fully set forth, Paragraphs I, II, III, IV, V, VII, VIII, IX and X of his First Cause herein.

II.

That at the times herein mentioned, defendant owed plaintiff the duty of providing a seaworthy vessel in which to work and defendant failed to do so; that the aforesaid injuries, sustained by reason of the incident hereinabove more fully set forth, were proximately caused by reason of the negligence of the defendant Pacific Far East Lines, Inc., its masters, officers, agents and employees in maintaining said vessel, "S. S. Fleetwood" as an unseaworthy vessel, at the aforesaid time, place and hour; that said vessel was unseaworthy in that defendants:

1. Failed to provide plaintiff with a safe and proper place to work while he was aboard said vessel.

2. Failed to provide plaintiff with competent and efficient supervisory employees of the defendant, then and there charged with the safety, control and management of said vessel.

3. Failed to warn plaintiff of the dangers to be encountered by virtue of the failure of defendants to erect and maintain proper safeguards, guard lines, guard rails, guard chains and the like around said number three and/or four or five hatches aboard said vessel.

4. Failed to erect and maintain proper safeguards, guard lines, guard chains, guard rails and the like for the protection of persons lawfully aboard said vessel and within the course of their employment in and about said number three and/or four or five hatches of said vessel.

5. Failed to provide proper and safe approaches, areaways, egress and ingress to and from said number three and/or four or five hatches of said vessel.

Wherefore, Plaintiff John Williams prays damages against the defendants on his First and Second Causes of Action:

1. General Damages—$150,000.00.
2. Special Damages for past loss of earnings—$4,000.00.
3. Special damages for future loss of earnings, as may be alleged.
4. Special damages for present and future medical, hospital and doctors' bills, as may be alleged.
5. Costs of suit.
6. All further meet relief.

Melvin M. Belli, Sr.
E. Brawner Johnson,

By /s/ E. Brawner Johnson,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 29, 1954.

Office - Supreme Court, U.S.
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SEP 21 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 268

PACIFIC FAR EAST LINE, INC., a corporation,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

PACIFIC FAR EAST LINE, INC., a corporation,
Petitioner,

vs.

JOHN WILLIAMS,
Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

No opinion was filed in the United States District Court for the Northern District of California and consequently there are no reports.

The opinion of the Court of Appeals was filed May 23, 1956, and is unreported. A copy is reproduced in the appendix of the petition.

On June 20, 1956, an order was entered by the Court of Appeals staying issuance of mandate pending the filing, consideration and disposition by this court of petition for

writ of certiorari to be made by petitioner, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 23, 1956.

STATEMENT

The statement in the petition is inadequate, so it is necessary to set out the facts of this case here.

John Williams, a longshoreman, was employed by West Coast Terminals, a stevedoring company. The West Coast Terminals, by agreement with Pacific Far East Line, Inc., a corporation, furnished longshoremen to load the *S. S. Fleetwood,* a refrigerator ship. Among the longshoremen who went to work on the *S. S. Fleetwood* was the respondent.

Work was commenced by the night crew, of which John Williams was a member, at 7:00 P.M. The only equipment provided by Pacific Far East Line, Inc. for carrying on this work was supplied prior to the commencement of work at 7:00. During the time between 7:00 and the occurrence of the injury to John Williams the ship and this equipment was at all times under the general control and supervision of Pacific Far East Line, Inc. who, through its officers, had both knowledge of and general control over this equipment.

A few minutes before midnight the longshoremen replaced the five insulation plugs in the No. 5 hatch prior to leaving for their midnight lunch. As soon as this had been done it became the duty of the reefer engineer, an employee of the petitioner, to turn on the blowers in the hold and to turn off the fixed hold lights. This is done in order to lower the temperature in the hold which inevitably rises while the plugs are off and the hold is being loaded.

At 1:00 A.M. the longshoremen returned to work. Their first task was to remove the plugs. The reefer engineer has the duty at this time to turn off the blowers and to turn on

the fixed hold lights. As pointed out in the Circuit Court, these hold lights are under the control of the ship's officers.[1]

Williams and another longshoreman climbed down onto the plugs and hooked the key plug onto a wire sling connected with the cargo winch. Both longshoremen then got out of the way, Williams by leaving the hatch. It is necessary to get well away because a plug is large and heavy and there is a probability that it may swing. There is no evidence as to where his partner went.

The winch lifted the plug and carried it over to the inshore deck of the ship where it was unhooked by two other longshoremen.

Williams then started back into the hatch to hook up the next plug. He came back by walking sideways along the coaming holding onto the guard rail until he was in position above the ladder which leads into the hold. At that point he stepped back and down to the first handhold on the ladder, slipped on the frost which had formed there and fell through the 9'6" by 4 foot opening into the hold, sustaining very serious and permanently disabling injuries.

The method used by Williams of leaving and returning to the hatch was one customarily used by longshoremen.

The usual lighting provided by a ship for night work while a hatch is being uncovered is as follows: permanent floodlights on the king posts, or masts, shining down in the area; some small amount of reflected light from the dock lights; portable cargo lights supplied by the ship; and fixed lights in the hold.

At the time Williams was injured, however, the floodlights from the king post and the lights from the dock were both blocked out by the presence of a large tent over the

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1. See opinion of the Circuit Ct. p. 2, Appendix, Petition for Writ of Certiorari.

hold, making the area like the inside of a circus tent with lighting on the outside only.[2] In fact, this covering is called a "Seattle Tent". The lights in the hold which throw light up on the ladder were not turned on. Substantially, the only lighting available was that given off by the cargo lights.[3]

After the hatch has been opened the cargo lights are hung down into the hatch. However, until the hatch has been opened, they cannot be hung down in this manner.

The usual cargo light, and presumably the ones supplied, is uninsulated. It uses a three hundred watt globe with a reflector. There is a wire cage over the front which is flat so that it can be placed face down when it is not in use. There are two ways to hold these lights: by a cord fastened to the base of the light or by holding the uninsulated base in the hand. The cargo lights were turned on at least eight hours before the accident.

When the cargo lights are sitting on the deck before the hatch has been completely opened, the hatch coaming blocks off most of the light they give from the hatch area.

The only place provided for lashing a cargo light so that it will light the hatch area is to the guard rail which runs in front of the winch driver. There is an ever present danger that it may be smashed by a swinging plug if this is done.

If a longshoreman were to hold a cargo light so that it shone in the area it would be almost impossible to hold the light in such a fashion as to give effective lighting and not run the very real danger of temporarily blinding one of the

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2. See picture included at the end of this statement.

3. As the Circuit Court said: "The evidence for appellee (respondent) tended strongly to show that the lighting above the plugs was insufficient to disclose the existence of the hazardous condition * * *." Opinion of the Cir. Court, page 2, Appendix, Petition for Writ of Certiorari. And see the precise description of the lighting situation following the sentence quoted.

constantly moving longshoremen in the partly opened hatch area or the winchdriver.

In the area by the ladder frost or ice had formed from the action of the cold air blown up from the hold striking the warmer air above.

Williams was unable to see that this area had frosted up, because of the inadequate lighting provided by the ship, and slipped on the frost and fell into the hold.

On the basis of the facts presented, the arguments made by counsel, and the instructions of the court, the jury found the defendant was negligent or the ship was unseaworthy because of inadequate lighting or the presence of frost or both, and returned a verdict in favor of the plaintiff. The Court of Appeals for the Ninth Circuit affirmed this verdict.

REASONS FOR DENYING THE WRIT

1. The Question of the Scope and Applicability of the So-Called Rule Pertaining to Transitory Conditions Is Not Relevant Under the Facts of This Case and No Right of the Present Litigants Depends Upon This Question.

The failure to provide adequate lighting occurred at least six hours prior to the injury; the condition of inadequate lighting was caused by the negligent failure of the shipowner himself to provide adequate lighting; the shipowner had actual knowledge of the inadequate lighting as well as general control over and supervision of the situation; and the injury was not caused by a foreign substance, but was due entirely to an inherently unseaworthy ship.

The ship owner has an absolute, non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen.

Seas Shipping Company v. Sieracki (1946), 328 US 85, 90 L.Ed. 1099, 66 S. Ct. 872;

Petterson v. Alaska SS Co., 205 F.2d 478, affd. without opinion by the United States Supreme Court in 348 US 914.

In the instant case petitioner failed to provide a safe and seaworthy ship and appliances,[4] by reason of its failure to supply adequate lighting among other reasons, and respondent longshoreman was injured solely because of this failure. The condition of lack of adequate lighting existed from the moment respondent longshoreman began to work on the ship.

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4. As the Circuit Court said, page 3, Opinion of the Circuit Court, Appendix Petition for Writ of Cert.: "In this state of the proof * * * the jury were not unwarranted in finding unseaworthiness or negligence, or both, on the part of the shipowner."

Even assuming it were true that the precise combination of circumstances causing the injury existed for only a relatively short period of time, this fact does not bring the case within the "rule" (if there can be said to be a rule) pertaining to "transitory conditions" because this combination of circumstances was caused by the condition of inadequate lighting facilities, which condition existed from the moment the injured longshoreman began his work. Thus, in *Poignant v. United States*, 225 F.2d 595, (2d Cir., 1955) where plaintiff slipped on an apple skin or other piece of garbage and was injured, the court held that although a ship does not become unseaworthy merely because of the temporary presence of a foreign substance, if the presence of this substance was caused by the lack of adequate equipment, the lack of garbage chutes in that case, then the vessel would be unseaworthy and the injured party would be entitled to a verdict. And in *Cookingham v. United States* itself, 184 F.2d 213, 1950 AMC 1793, cert. denied, 340 US 935 (1950), the court held only that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are *inherently seaworthy* absolutely free from unsafe conditions.[5] In the instant case, however, the lighting was inherently unseaworthy since inadequate. Therefore, the so called *Cookingham* doctrine has no application to the present situation and does not exonerate a shipowner from liability for an injury caused by his failure to furnish inadequate lighting, even if the precise circumstances combining to cause the injury does not exist for an extended period of time.

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5. See *Cookingham v. United States*, 184 Fed. 2d 213, 1950 AMC 1793, cert. denied, 340 US 935 (1950). "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are *inherently sound and seaworthy* absolutely free at all times from transitory unsafe conditions * * *" (emphasis added)

Essentially negligence is unreasonable conduct.

Rest. Torts, § 282.

It is not unreasonable for a shipowner to allow a potentially dangerous foreign substance to remain on his ship for a long enough time for him to discover its presence when such substance was placed there by a third party and without the knowledge of the owner. It is unreasonable, however, and therefore negligent for a shipowner himself to cause a dangerous condition. A dangerous condition caused by a shipowner or his agents can not be a condition of which the shipowner has no knowledge. The law does not pardon the unreasonable conduct and negligence of a shipowner and exempt him from liability therefor simply because the negligent acts did not exist over an extended period of time. Thus, in *Boudoin v. Lykes Bros. S.S. Co.*, 348 US 336 (1954), a case in which a seaman recovered for injuries inflicted by the viciousness of a fellow seaman, the negligent act was hiring the vicious seaman. The fact that this act of hiring did not require much time was not held to excuse the shipowner. It is unreasonable and therefore negligent to hire a vicious seaman and it is likewise negligent to provide inadequate equipment, rendering the ship an unsafe place in which to work. In the case of *Brabazon v. Belships Co.*, 202 F.2d 904 (3d. Cir. 1953), 1953 AMC 737, where a stevedore was injured by the breaking of a board the condition of which he was unable to see because of inadequate lighting, the court held the shipowner liable, stating at page 909-910: "Finally, it is clear that the inadequacy of the board which broke to support a man's weight would have been apparent but for the darkness. Light would have made the danger obvious and would have enabled the workman to avoid it. Accordingly, we conclude that the negligent failure of the ship to supply needed lights was a responsible

cause of (longshoreman's) injury * * *" It is true that the court found that the mere fact that the board was defective was not enough to render the shipowner negligent, but this was not simply on the grounds, as seemingly implied by petitioner, that the shipowner had no knowledge of or time in which to acquire knowledge of the defective condition of the board. Rather the court found the shipowner not negligent for the breaking of the board alone because the owner did not supply the board and in fact the source of the offending board was unknown, and futhermore it held such a board not a part of a ship's gear and not an appliance thereof. The condition of inadequate lighting, however, which was caused by the shipowner and known to him was held to be negligence and there was no discussion of the length of time during which this condition had existed. Any discussion of transitory conditions was addressed to the question of discovery by the shipowner of the defective condition which was not caused by him, the board, and none of it was directed to the question of the inadequate lighting condition which was known to and caused by the shipowner.

Similarly, in *Guerrini v. United States*, 167 F.2d, 352 (2d Cir. 1948), where a bricklayer was injured by slipping on some grease, the court affirmed the duty of the shipowner to provide a reasonably safe place to work. In view of this affirmation, the language in the case to the effect that the shipowner's negligence depended upon the length of time the grease had been on the deck can only be understood as based upon the assumption that the owner was not shown to have been responsible for the grease being on the deck and therefore had no knowledge of its presence. As a matter of fact there was no evidence at all on the question of how the grease got on the deck. Such a case is not authority

for the proposition that a shipowner is excused from liability for having himself created an unreasonable and dangerous condition simply because his unreasonble and negligent acts did not require much time for their consummation.

Seaworthiness is an absolute warranty by the shipowner and does not depend upon negligence.

Seas Shipping Company v. Sieracki, 328 US 85 (1946);

Petterson v. Alaska SS Co., 205 F.2d 478, affirmed 348 US 914.

This does not mean, however, that a ship must be absolutely fit and 100% safe, it simply means that a ship must be reasonably fit.

Poignant v. United States, 225 F.2d 595 (2d Cir. 1955).

The *Cookingham* case, supra, held only that the absolute warranty of seaworthiness is not breached by the presence of a foreign substance when there is no showing of how it got on the ship, when the owner had no knowledge of or control over its existence, when the owner did not have sufficient time to discover its presence, and *when the ship is not inherently defective.*[6]

That is to say, the court found such circumstances did not render the ship unreasonably unfit. In the instant case the circumstances are very different and therefore not controlled by the *Cookingham* case. Here the condition of the ship was inherently defective because the lighting equipment was inadequate and this defective condition was caused by the shipowner and known to him and subject to his control. This situation renders the ship unreasonably unfit.

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6. See footnote 5 p. 8 supra.

Thus, in *Petterson v. Alaska SS Co.*, 205 F.2d 478, aff'd without opinion 348 US 914, a shipowner was held liable to a stevedore for injuries inflicted by a breaking block even though the block was brought on board by the stevedoring company. The court declared at page 479, "It is not necessary to show, as it is in negligence cases that the shipowner had complete control of the instrumentality causing the injury; or that the result would not have occurred unless someone were negligent. It is only necessary to show that the condition upon which the absolute liability is determined —unseaworthiness—exists. (*Mahnich v. Southern SS Co.*, 321 US 96, 64 S.Ct. 455, 88 L.Ed. 561)." In this case there was no discussion of the period of time during which the block had been defective. The court simply found that the block broke and that a reasonably fit block would not have broken and concluded that this established unseaworthiness. This holding, affirmed by this Court, clearly shows that the element of time discussed in the *Cookingham* case has no application to inadequate appliances—or in the words of the *Cookingham* case itself, inherently defective appliances. It applies only to dangerous foreign substances not shown to have been on the ship as a result of the negligence of the owner, because only in that situation does the element of time render the dangerous condition not unreasonable and therefore not unseaworthy.

Shannon v. Union Barge Line Corp., 194 F.2d 584 (3rd Cir. 1952) interpreted the *Cookingham* case in the above way. In the Shannon case a barge employee slipped on some oil. The court asked the question, "Assuming that there was oil on the deck, how did it get there and who put it there?"[7] And then the opinion stated "(T)he record is silent of any testimony that the oil was tracked onto the deck by the em-

7. *Shannon v. Union etc.* at p. 585.

ployees of the ship." And finally the court declared, plaintiff's "own testimony * * * eliminates the suggestion that prior to this accident only the ship's crew had access to the deck. We are then in the same situation as that shown in our case of" *Cookingham*.[8]

Similarly, it was stated in the *Poignant* case, supra, at page 597-8; "The *Petterson* case, later decided, makes it plain that the results reached in this line of cases (*Cookingham*) cannot be justified by the mere fact that the existence of such a condition was not brought to the knowledge of the owner or that he lacked the opportunity to prevent or correct the condition." The opinion then points out that the *Cookingham* case decided only that the situation there involved was not so unreasonable as to render the ship unseaworthy. And finally the court held that if the offending garbage on which plaintiff slipped was caused by inadequate equipment, that condition would constitute unseaworthiness and would not be governed by the *Cookingham* doctrine. The fact that garbage may not have been on the deck very long, did not excuse the shipowner's failure to provide adequate equipment.

In fact, we are unable to locate any cases in which the failure of a shipowner to provide adequate appliances and lighting has been found not to render the ship unseaworthy merely because of some transitory notion. Petitioner has not been able to point out any such cases to us.

In *Adamowski v. Gulf Oil Corporation*, 197 F.2d, 523 (3rd Cir. 1952), 1952 AMC 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950) the crucial finding upon which the court based its holding that unseaworthiness had not been proved was that the passageway in which the injured plaintiff slipped was

8. Ibid.

"perfectly sound."[9] There was no evidence of whether the temporarily dangerous condition was caused by the ship or some third party. "Again, the plaintiff has not offered any proof whatsoever that the defendant knew or should have known of this unsafe condition."[10] If the condition had been caused by the defendant or his agents it could not be said he was without knowledge of its existence.

Shannon v. Union Barge Line Corp., supra, is, like the *Adamowski* case, another slipping case. The claim of unseaworthiness was based upon the presence of a bar across a door against which plaintiff fell when she slipped. The court found this bar did not render the ship unseaworthy because it was not hidden and because there was another available safe means of egress which the plaintiff might have chosen. Any discussion of time in the case was addressed purely to the question of negligence, not unseaworthiness, in allowing an alleged spot of oil to remain on the deck. The court held that allowing this post to remain did not constitute negligence because it was not shown how it got there and in fact the plaintiff's "own testimony * * * eliminates the suggestion that prior to this accident only the ship's crew had access to the deck."[11]

In *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1952) plaintiff fell and was injured because of inadequate lighting. The court found that the ship was unseaworthy because of the failure of the lighting. The following was stated, at page 789, on the meaning of unseaworthiness: "The basic elements of the doctrine are now well settled.

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9. *Adamowski v. Gulf Oil Corporation*, 197 F.2d. 523 (3rd Cir. 1952), 1952 AMC 1221, affirming 93 F. Supp. 115 (E.D. Pa. 1950) at p. 117.

10. Ibid.

11. *Shannon v. Union Barge Line Corp.*, 194 F.2d 584 (3rd Cir. 1952) at page 585.

Ever since *The Osceola,* 1903, 189 US 158, 23 S.Ct. 483, 487, 47 L. Ed. 760 it has been the law that 'the vessel and her owner are * * * liable to an indemnity for injuries received * * * in consequence of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' The disjunctive used must be regarded as introducing a further explanation of the nature of unseaworthiness, for several of the cases to which *The Osceola* referred involved 'not providing proper appliances, so that the case was one * * * of unseaworthiness.' " It is true that the court did mention the fact that the inadequacy of the lighting system was known to the ship for forty-eight hours before the accident, but in view of the above quoted passage and the opinion as a whole this must be regarded as dicta not necessary to the holding. Perhaps it was included because of some uncertainty about the meaning of the *Cookingham* case, but if there ever was any such uncertainty certainly it has been clarified by the decision of this court in the *Petterson* case.

In *Brabazon v. Belships Co.,* 202 F.2d 904 (3rd Circ. 1953) 1953 AMC 737, where a stevedore was injured by the breaking of a board the condition of which he was unable to see because of inadequate lighting, the injured plaintiff based his claim on negligence alone and the question of seaworthiness was never discussed. The court held the failure of the ship to provide adequate lighting was negligence. For a fuller discussion of the treatment of the negligence question in this case, see brief pages 9-10 supra.

Boyce v. Seas Shipping Co., 152 F.2d 658 (2d Cir. 1945), 1946 AMC 45, is another slipping case. The crucial fact upon which the non-liability of the shipowner was based was that there was no evidence that any grease or other slippery substance was present at all. Thus at page 658: "The judge's finding of fact was not 'clearly erroneous' that 'there was no

credible' evidence in this case that either the galley or alleyway was wet or greasy * * *.'" It is true the opinion did also mention that the evidence did not show that the shipowner had knowledge of the condition but in view of the above this would seem irrelevant and, furthermore, if the condition had been due to his action, he would of necessity have knowledge of it. The court did expressly assume that there are occasions when a ship may be liable for an oily or greasy pantry floor, but, quite naturally, it found this was not such a case since there was no evidence that an oily or greasy pantry floor existed.

Poignant v. United States, has been discussed, supra. It is another slipping case. It held simply that although a ship is not necessarily rendered unreasonably unfit and therefore unseaworthy by the mere temporary presence of a foreign substance, the cause of which presence is unexplained, if the cause of the presence of the foreign substance is an inadequate appliance the ship is unseaworthy.

Grillea v. United States, 232 F.2d 919 (2d Cir. 1956), was a case involving not inadequate appliances but rather the failure by the crew to use properly the adequate appliances which were provided. Even so, the court found the ship to be unseaworthy, The plaintiff was injured by falling through a perfectly sound hatch cover which gave way because he himself had put it on incorrectly a short time before the accident. Nevertheless the court found that the ship with the hatch-cover in such a condition was unseaworthy. The shortness of the time during which the condition existed was not held to bar recovery and any discussion of this matter was not addressed to the question of time itself but to the question of whether the situation was an intermediate step in an operation, making the ship unseaworthy, or whether it was simply an incident in a continuous operation.

The decision of the court below is not inconsistent with the *Cookingham* case. It correctly stated that even if the condition of inadequate lighting be regarded as "transitory," that fact would not serve to absolve the petitioner of liability in this case. This statement is correct because the basis for the holding in the *Cookingham* case was the lack of knowledge and control, the fact that the dangerous condition was not caused by the shipowner, and, most important, the finding that the ship was inherently seaworthy. In the instant case the shipowner had both knowledge and control, he himself caused the dangerous condition, and the ship was inherently unseaworthy because of the inadequate lighting provided by the shipowner. The *Cookingham* case does not apply to such a situation and, as has been shown above, no case has ever held that it does. In any event, the decision below did not hold that the condition of inadequate light was "transitory" and in fact it was not, since the failure by the ship to provide adequate lighting occurred at least six hours prior to the accident. Therefore, the decision below can not be inconsistent with *Cookingham v. United States* because no "transitory" condition was involved and even if such a condition were involved the case is clearly distinguishable on other grounds.

The distinctions between the failure to provide adequate lighting in the instant case and the jello on the stairs in the *Cookingham* case are (1) the failure to provide adequate lighting was not transitory and even if the particular combination of circumstances causing the injury was of short duration, the *Poignant* case clearly holds that this is not enough to excuse the failure of the ship to provide adequate appliances under some "transitory" notion; (2) the failure to provide adequate lighting was caused by the shipowner himself and therefore within his knowledge whereas it was

not shown how the jello got on the stairs and certainly it was not proven that agents of the shipowner put it there or the court could not have said that the shipowner had no knowledge of its existence; (3) the lighting was at all times under the control and supervision of the ship; and (4) the failure to provide adequate lighting rendered the ship *inherently* unseaworthy, just as a ship with a defective cotter key in the king post for 6 seconds, or 6 hours or six days, would be inherently unseaworthy, whereas the ship in the *Cookingham* case was inherently seaworthy.

In no case dealing with the so-called "transitory" rule has the evidence clearly shown that the alleged transitory condition was caused by the vessel or her personnel. For a discussion of the *Adamowski* case, see brief p. 13 supra. In the case of *Holliday v. Pacific-Atlantic S. S. Co.*, 99 F. Supp. 173 (D. Del 1951), rev'd on other grounds, 197 F.2d 610 (3rd Cir. 1952), cert. denied 345 U.S. 922 (1953) the court had this to say, at pages 177-8, on how the injury causing substance became where it was: "There is no direct evidence to show how or why the wires were protruding from a box or package * * *; there is nothing to indicate that that condition was caused by any negligence on the part of any of respondent's officers or employees, or * * * that the ship's officers knew of it." In *Stopler v. United States* (E.D. Pa. 1950), 1950 (AMC 551), the court expressly found that there was no evidence that any of ship's personnel had dropped the bit of food causing the injury. Likewise in *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96 (E.D. N.Y. 1954) 1954 AMC 806, there was no evidence at all on the question of how the offending substance got where it was. The court stated at page 99: "The *mere* presence of grease or oil or other transitory substance on a deck of a vessel, causing one to slip * * * has been held not to constitute unseaworthi-

ness." (Emphasis added.) And at page 99 "The weight of authority is that an injury caused by slipping on a spot of oil or other matter of a transitory nature *in and of itself* does not support a cause of action for * * * unseaworthiness." (Emphasis added.) Thus, the court held only that the *mere presence* of a foreign substance *in and of itself* does not constitute unseaworthiness. This can hardly be said to be a holding that if the presence of the substance were due to the negligence of the ship or her personnel even so the vessel would not be unseaworthy. And in *Blodow v. Pan Pacific Fisheries, Inc.*, 128 Cal. App. 2d 428, 275 P.2d 795 (1954) the court found that there was no evidence of how the offending oil got where it was. "If any of the ship's authorized personnel knew, or should have known, of the presence of the foreign substance, their actual or constructive knowledge would be imputed to the shipowner. Since the evidence here did not disclose knowledge by any of respondents' employees * * *"[12] If none of the employees knew of the condition it can not be said that they caused it.

As indicated above, the shipowner has an absolute and non-delegable duty to provide a safe and seaworthy ship and appliances to longshoremen. It is true that a ship need only be reasonably fit, not absolutely safe, but no case has ever held a ship to be seaworthy under the facts here involved.

It is respectfully submitted that in the *Cookingham* case a *theory* of "notice" was confused as many state courts have confused the requirement of "notice" in "slipping" cases. The basic situation is that a patron-invitee slips in a store on a foreign substance in one of the aisles. Most of the states hold no liability without proof of notice to the

12. *Blodow v. Pan Pacific Fisheries, Inc.*, 128 Cal. App. 2d 428, 275 P.2d 795 (1954) at p. 435.

defendant owner sought to be charged of the presence of the foreign substance or in some cases, proof of the elapse of a period of time sufficient to cause a reasonably prudent shopkeeper to acquire notice or to remove the substance.

But, and here we respectfully submit, is where many state courts have been confused, if the foreign substance was placed or dropped on the floor of the store by an *agent* or *servant* of defendant storekeeper, then defendant storekeeper is chargeable via respondiat superior because of his agent or servant's negligence *and no notice is necessary to him since be is presumed to have notice of an act by his vicarious ego, to-wit, the agent or servant.*

If the doors of a store open at 9 a.m., and the first person in the store slips on a foreign substance, we respectfully submit that notice would not be necessary since the foreign substance could only have been put there by an agent of the defendant storekeeper while or during the time the store was locked overnight. Is not a boat similar to a "locked store"? The only person who could deposit a foreign substance on the boat would be the agent of the defendant, since by law they cannot be the agent of a plaintiff seaman, the fellow servant rule being abrogated in admirality.

We respectfully submit the case at bar can be clearly distinguished from the *Cookingham* case; but we further respectfully submit that to the extent that the *Cookingham* "doctrine" may apply to a transitory condition such as a foreign substance on the deck of a freighter, where every person is an agent of the defendant, and in that situation require "notice" of the presence of the foreign substance, to that extent the *Cookingham* "rule" is not sound law and has confused its factual hypothesis and the legal conclusions flowing therefrom.

No case has ever held that the *Cookingham* case applies to the situation here involved. Nor has any case ever held that the only duty of a person who himself has negligently caused an unsafe condition is to correct the condition within a reasonably short period of time. One who negligently causes a condition can not claim to be without knowledge of his own acts, and therefore any doctrine dealing with the duty to correct a condition after it has become known or ought to have become known must refer to conditions caused by the negligence of some third party. These are the universally accepted principles of the law of negligence applicable to employees and business invitees.[13]

The holding of the court below does not conflict with any decisions of this Court.

This Court in *Boudoin v. Lykes Bros. S.S. Co.*, 348 US 336 (1954) correctly stated that an owner is liable for the acts of a drunk seaman only if that seaman had a wicked disposition, a propensity to evil and the like. Quite correctly this means that a vessel is not unseaworthy because a seaman of average disposition becomes dangerous because of intoxication and assaults another seaman, but this is not because such an occurrence would be a so-called "transitory" condition. The reason is simply that if the crew are of normal disposition then the ship is reasonably fit and reason-

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13. Thus, the occupier of premises owes a duty to business invitees to use reasonable care to keep the premises in a reasonably safe condition. *Freeman v. Nickerson*, (1946) 77 Cal. App. 2d 40, 174 P.2d 688; *Le Blanc v. Atlantic Bldg. Supply Co.*, (1949) 323 Mass. 702, 84 N.E. 2d 10; and *Swift & Co. v. Schuster*, (1952) CCA 10, Utah, 192 Fed. 615 (a government meat inspector was injured as the result of a fall while stepping from a raised inspection platform to wet, slippery and greasy slaughter floor. In holding he was a business invitee, it was stated that the meat packing corporation owed him the duty to keep and maintain the premises in a safe condition).

And see Rest. Torts, §§ 341, 343; Prosser, Torts 2nd Ed. 1955, §§ 67, 78.

able fitness is all that is required. This is not authority for the proposition that a ship with inadequate lighting is reasonably fit and therefore seaworthy, and no case has ever so held.

This Court in the *Boudoin* case did not trouble itself over the question of whether the act of hiring the seaman required much time, nor did it discuss the question of whether the actual assault took much time. It held that a seaman of vicious nature is an inadequate seaman and therefore the ship is unseaworthy. The court below held that lack of light is inadequate lighting and therefore the ship is unseaworthy. These decisions are entirely compatible.

The case of *Poignant v. United States*, supra, was not decided in this Court. It has been analyzed above. Examining the quotation from the opinion in this case contained in petitioner's brief, pages 17-18, we find "(S)o it does not become unseaworthy by reason of a temporary condition caused by a transient substance *if even so the vessel was as fit for service as similar vessels in similar service.*" (Emphasis added.) The material quoted pertained to the presence of some garbage and the court specifically stated that the evidence did not show how the garbage got where it was. The court then concluded that if the presence of the garbage was due to an inadequacy of the ship's garbage chutes, the ship would be unseaworthy. In other words, if the garbage chutes were inadequate the vessel would not be as fit for service as similar vessels in similar service. The opinion below held that since the ship's lighting was inadequate the vessel was not as fit for service as similar vessels in similar services and was therefore unseaworthy. The holdings are consistent.

A more recent decision by this Court on the subject is the case of *Petterson v. Alaska S.S. Co.*, supra. This case has

been elucidated, above, and is not inconsistent with the holding of the court below.

This Court cannot settle the question of the application of the so-called "transitory condition rule" to the doctrine of unseaworthiness by reviewing this case. At the most it could pass upon the question of the application of this "rule" to the facts involved in the instant situation. This is unnecessary because the application of this "rule" to the facts here involved is clear and the decision on this matter by the lower court is consistent with all the cases decided by this Court and other courts of appeal. Furthermore, the question of the so-called "transitory condition rule" is not even reached in the instant case because the lower court based its decision on the ground of negligence as well as unseaworthiness. Therefore, no substantial rights of the parties here involved are affected by the question of the application of the so-called "transitory condition rule" to the doctrine of seaworthiness, which question petitioner has asked this Court to review. A quote from the opinion below makes this plain: "In this state of the proof on appellee's behalf the jury was not unwarranted in finding unseaworthiness, or negligence, or both, on the part of the shipowner."[14]

This case as it now stands could not serve as authority for the horrors paraded on page 18 of petitioner's brief. The condition here involved was not fortuitous but was caused by the negligence of the shipowner. The condition caused by the negligent failure of a shipowner to provide adequate lighting is rather unlike the condition existing as a mast struck by lightning tumbles toward the deck.

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14. Opinion of Cir. Ct. p. 3, Appendix, Petition for Writ of Cert.

The question of the application of the rule which has been applied to so-called "transitory" conditions is well settled in so far as it may pertain to the facts in the instant case. It does not require further review here. And it should not be reviewed here because no substantial right of the litigants depends upon this question.

2. Liability of a Shipowner Who Has Furnished Equipment Which May Have Been Adequate for Certain Purposes but Which Was Inadequate and Unsuitable for the Work Required to Be Performed.

The evidence in this case shows that although the shipowner supplied certain lighting equipment, there was no possible way this equipment could have been manipulated to provide adequate lighting. Thus, there was evidence which showed that three cargo lights were furnished by the shipowner to the longshoremen and that this was the only effectual lighting available at the time the longshoreman, Williams, fell. The question of whether these cargo lights provided or could have provided sufficient illumination was sharply controverted and the jury decided adversely to the petitioner. This finding has been concurred in by the court below. The only other lights available were the hold lights, certain fixed flood lights, and certain dock lights. There was evidence that the hold lights were not turned on even though it was the duty of the shipowner to turn them on, and there was evidence that the flood lights and dock lights were blocked out. Based upon this evidence the jury returned a verdict adverse to the petitioner and the court below concurred.

This is not a case in which adequate equipment has been provided but used improperly or not used at all. Lighting equipment which can not possibly be used in such a manner as to afford sufficient illumination can not be said to be

adequate. The mere fact, if it be a fact, that this equipment could have furnished adequate illumination for certain purposes not involved in the situation under consideration does not render it adequate. The fact remains that the equipment furnished by the shipowner was not capable of adequately illuminating the work of the longshoreman on his vessel. The jury passed upon this question and the lower court concurred with the jury's decision.

In view of the fact that the equipment furnished by the shipowner was not adequate to provide illumination for the longshoremen engaged in loading its vessel, the question of the liability of a shipowner who has furnished adequate equipment is not reached. Under the facts of the present case it is impossible for this Court to review this question.

Perhaps the question raised by petitioner is important but it is not reached under the facts of the instant case. Such a question is hardly an appropriate subject for review by this Court.

3. Failure of an Appliance to Be Operated for Purpose for Which Suitable, in Conjunction with Failure to Provide Any Other Appliance Which Could Have Accomplished the Purpose, Does Render a Vessel Unseaworthy When the Result of the Failure to Operate and the Failure to Provide Is a Condition of Inadequate Illumination.

The respondent, Williams, was injured because of lack of adequate lighting. There was testimony that certain hold lights were not turned on. It was the duty of the shipowner to turn on these lights. There was testimony that had these lights been turned on they would have provided light in the area from which respondent Williams fell when he incurred his injuries. There was testimony that the other lighting equipment furnished by the shipowner was incapable of illuminating this area. Under these circumstances the jury

found adversely to the petitioner and the court below concurred.

Petitioner does not contend that a vessel is seaworthy if its lighting is inadequate. The failure of the owner to turn on the hold lights was only one of the owner's failures and taken in conjunction with the others this failure created a condition of inadequate lighting and therefore unseaworthiness.

The failure to turn on the hold lights was not the basis of the decision below. The basis of the decision was the failure to provide adequate lighting and the failure to turn on the hold lights was simply one cause of this condition. Therefore, the question raised by the petitioner is not reached under the facts of this case.

If it were admitted that the failure to turn on these hold lights in and of itself did not constitute unseaworthiness, it is hard to see how this fact cures the failure to provide adequate lighting, upon which failure the conclusion of unseaworthiness was predicated. Therefore no substantial right of the litigants in this case depends upon the question of whether the failure to have on the hold lights in and of itself constitutes unseaworthiness.

Irrelevant though it may be, we will take up petitioner's contention.

This is not a situation in which an item intended for one purpose is used for another. This might be a reasonable argument if a longshoreman had been using a hatch light fixture to lift cargo. Cases cited by petitioner fall in this category. This is a situation in which an item was not used at all, even though suited to the purpose in question and probably intended for that purpose. Lights have but one use, that is, to provide illumination. The intention of the shipowners in providing these lights was presumably to pro-

vide illumination in the hatch area and whether they would provide and were intended to provide light in one area and not in a place three or four feet away is a question of fact which was argued to the jury.

Holub v. Sword S.S. Line, 132 Fed. 2d 206 (5th Cir. 1942) 1943 AMC 898, held that a shipowner was not liable on the grounds of unseaworthiness of his ship for an injury resulting from the use of an appliance for a purpose for which it was not intended when adequate appliances for the purpose were provided. This is hardly authority for the proposition that the failure to use hold lights for a purpose for which they were suitable, and perhaps intended, does not constitute unseaworthiness when no other appliances were available which could have accomplished the purpose for which the hold lights were suitable. Likewise in the case of *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Circ. 1930), 1930 AMC 1390 the situation was one in which the injury was caused by the use of equipment for a purpose for which it was not intended, not the failure to use equipment for a purpose for which it was suitable and perhaps intended. And even in that situation the court was careful to point out that there was equipment available by means of which the job could have been performed with safety. In the instant case, there was no equipment which could have provided adequate illumination except the hold lights.

We agree with petitioner's contention that seaworthiness has always been held to mean adequate for the purpose intended and ordinarily used. The holding of the court below was that the lighting of the ship was not adequate for the work of the longshore which was the purpose intended. The court below did not find that the vessel was unseaworthy simply *because* hold lights were not operating. Indeed petitioner does not even claim this. The precise

language of petitioner's claim is "Consequently the holding of the court below, that the vessel was unseaworthy *when* an appliance was not operating for a purpose for which never intended or customarily used, is contrary to the concept of seaworthiness adopted by this court." (emphasis added)[15] Whatever meaning this quoted sentence may have it is not supported by any cases cited by petitioner.

4. Sufficient Evidence Was Adduced to Support the Concurrent Findings of Two Courts Below That Respondent Williams Was Injured Due to the Negligence of the Shipowner or Unseaworthiness of the Vessel.

Each and every factual issue urged by petitioner here either was or could have been argued to the jury. The jury decided adversely to him and found that the ship was unseaworthy or that the shipowner was negligent or both.

On disputed questions of fact the verdict of a jury will be treated as controlling for even if the question is a close one that fact will not justify either the trial judge or the reviewing Court in usurping the function of the jury.

Gardiner v. The New York & Porto Rico SS Co., 146 F.2d 420 (CCA 2d 1944);

Jacob v. City of New York, 315 US 752, 757, 86 L.Ed. 1166, 62 S.Ct. 854;

Norris, the Law of Seamen, Sec. 697.

In the trial court it was found as a matter of fact, based on substantial evidence, that the shipowner failed to provide adequate lighting. The Court below concurred. The Supreme Court will not ordinarily disturb concurrent findings of fact by two courts below.

See, e.g.,

Workman v. New York, N.Y. 1900, 21 S.Ct. 212, 179 US 552, 45 L.Ed. 314;

15. Petition at p. 25.

The Linseed King, N.Y. 1932, 52 S.Ct. 450, 285 US 502, 76 L.Ed. 903;

Anderson v. Abbot, Ky. 1944, 64 S.Ct. 531, 321 US 349, 88 L.Ed. 793, 151 ALR 1146, rehearing denied 64 S.Ct. 845, 321 US 804, 88 L.Ed. 1090.

And the Supreme Court will not grant a writ of certiorari to review evidence and discuss specific facts.

See, e.g.,

General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 178, 58 S.Ct. 849, 82 L.Ed. 1273;

N.L.R.B. v. Waterman S.S. Co., 309 US 206, 208, 60 S.Ct. 493, 84 L.Ed. 704.

See generally,

Robertson & Kirkham, Jurisdiction of the Supreme Court, Sec. 333, and the many cases discussed therein.

As indicated supra, the basis of the decision of the court below was the failure of the shipowner to provide adequate lighting. The fact that the shipowner failed to turn on hold lights which would have provided some illumination was simply one factor in the failure to provide adequate lighting. Even if it were admitted for the sake of argument that these hold lights would not have provided any illumination in the area in question, this fact could not cure the failure to provide adequate lighting. Therefore, the question of whether or not the hold lights would illumine a certain area is not reached under the facts of this case, is insubstantial, and is a question upon which no rights of the litigants in this case depends. Such a question will not be reviewed by this Court.

There is no direct evidence in the record of whether or not the hold lights, if on at the time respondent Williams suffered his injury, would have cast light on the area from which he fell. It is perhaps impossible to present direct evidence on this question since the lights were not on at the crucial time. The most that can be done is to present evidence from which it might reasonably be inferred that if the lights had been on they would have illuminated the area. Respondent introduced such evidence at the trial. The record is replete with testimony regarding the nature of the hold lights, their distance from the area in question, the wattage of these lights, and the like.

At the trial petitioner introduced the testimony of a man who had visited the scene of the injury long after its occurrence. This man testified only that at the time he visited the scene he did not happen to notice that turning on the hold lights made any difference. Counsel for respondent sought to introduce testimony of a man who was present at the time of the accident on whether at that time the hold lights would have made a difference in the visibility at point from which respondent fell. The court prevented him from introducing this testimony.

The jury considered the evidence introduced by petitioner and respondent and returned a verdict adverse to the petitioner. The court below found that the jury might reasonably have inferred from the evidence in the record that the hold lights, if on at the time of the injury, would have cast light upon the place from which respondent Williams fell.[16]

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16. See Opinion of Circuit Ct., p. 3, Appendix, Petition for Writ of Cert.

THE DECISIONS OF THE COURT BELOW ARE CORRECT AND NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS.

Penna. R. Co. v. Chamberlain, 288 US 333 (1933), and the other cases cited by the petitioner do not apply to the present situation in which the record contains no direct or positive evidence on the instant question. Extended quotation from *Penna. R. Co. v. Chamberlain* will show the real holding in that case. "The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by the deceased. Three employees, riding the nine-car string, *testified positively that no such collision occurred. They were corroborated by every other employee in a position to see* * * *. The only witness who testified for the respondent was" * * * a man who did not testify that there was a collision, but only testified to facts from which it could be inferred that there was such. (Emphasis added.) "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible *in the face of positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.* * * * *A rebuttable inference of fact* as said by the court in the Wabash Railroad case 'must necessarily yield to the credible evidence of the *actual occurrence.*'" (Emphasis added.)

In the instant case there is no positive testimony that if the hold lights had been on at the time of the injury they would not have cast light upon the area from which respondent Williams fell. There is no positive testimony contradicting the possible inference by the jury that they would have.

The evidence introduced by petitioner was merely the testimony of a man, who was not present at the time of the injury, that at the time he visited the scene, long after the injury, he did not notice that turning on the hold lights made any difference.

In all the cases cited by petitioner in footnote 19, page 26 of its brief, the facts were similar to the *Penna. R. Co.* case. These cases simply hold that an inference must yield to direct, positive, uncontradicted, unimpeached, and corroborated evidence of the existence of a fact. Petitioner failed to introduce any such evidence in the instance case, and probably the question here involved is not even susceptible to this sort of proof.

Sickles v. Graybar Electric Company, 219 F.2d 847 (7th Cir. 1955) cited by petitioner, while holding adversely to the plaintiff on the ground that an inference from circumstantial evidence must yield to positive and direct testimony, contains an edifying statement at p. 854: "Plaintiff cites and relies upon a number of cases which hold that a verdict may be sustained on circumstantial evidence. An examination of these cases discloses that they are of little if any aid to plaintiff in the instant situation. *Generally there was direct proof that the defendant committed or was responsible for an act and it was held that whether the act constituted negligence was a matter to be inferred by the jury from the circumstances.*" (Emphasis added.)

Substantial evidence was introduced that frost was present at the point at which respondent Williams fell. Even if such evidence had not been introduced, however, it would not constitute grounds for review by this Court. The holding below was that either the ship was unseaworthy or the shipowner was negligent or both. The basis of this holding was the lack of adequate lighting. The presence of the frost

merely heightened the fact that the inadequate lighting was the cause of the injury. There is no evidence in the record showing that the injury would not have occurred if the frost had not been on the area from which respondent Williams fell. Even if the jury had not believed the testimony tending to show that in fact frost was present, still they might reasonably have found that the lack of lighting was the cause of the injury. Therefore the question of evidence of frost raised by petitioner is not reached under the facts involved in this case. The question is insubstantial here. No right of the litigants here involved depends upon the answer to this question. It is not a fit subject for review by this Court.

The evidence introduced at the trial does not show conclusively which foot of respondent Williams slipped, the foot on the coaming or the foot on the ladder. The meaning of the language used by Williams in his testimony about how he fell is susceptible to more than one interpretation. That it was the foot on the ladder which slipped is a reasonable interpretation of the evidence. This particular point was not argued on trial nor mentioned at the time petitioner was making his motion for a directed verdict. If there are two possible interpretations of the meaning of words used and two possible inferences to be drawn from the meaning then the inference which will support the verdict of the jury should, of course, be drawn. The opinion below states that "He stepped back and down seeking to step onto a bar affixed within a recess in the coaming. * * *"[17] This language does show that Williams had one foot on the coaming when he slipped, but it does not show whether it was the foot on the coaming or the foot on the bar (ladder), onto which he stepped back and down, which slipped. In fact petitioner

17. Opinion of Circuit Ct., p. 2, Appendix, Petition for Writ of Cert.

does not even claim that it was not the foot on the ladder or bar which slipped. Petitioner only claims that plaintiff slipped "when he had one foot on the hatch coaming."[18] The fact that he had one foot on the coaming does not mean it was that foot which slipped.

At the trial counsel for the respondent Williams introduced both eyewitness and expert testimony on the question of frost. Counsel for petitioner also called an expert witness to dispute the issue. The jury heard both opinions.

Relevant extracts from the testimony of Houston Hall, an eyewitness, is as follows:

> "Q. Then you were pointing right here, is that correct?
>
> A. I could see the frost, it was formed, ice was, approximately, ice up here, but it was frosty up here, from where the plug was pulled out. Naturally, that pressure from the fan blows up and it blows that cold air, stuff, out and it forms." (141)
>
> • • • • • • •
>
> "Q. Is that where you saw the frost?
>
> A. I saw it up here, it was forming, you know, the fog.
>
> Q. You mean up in this area here, is that right?
>
> A. Yes.
>
> Q. Along the face of the iron, is that what you are telling us?
>
> A. Yes, in here, yes, because when they puttled the plug up, well naturally, the cold air blowing with the blowers on, it sheets it up." (142)

Relevant parts of the testimony of Jim Hotchkiss, a refrigeration engineer, are as follows:

> "Q. Mr. Hotchkiss, let's take this area, this enclosure here, for instance. If this area is closed, as

18. Pet.'s brief p. 27.

shown up here in Plaintiff's exhibit No. 2, and the air in that area below is refrigeration to 10 degrees, and then that area is opened by lifting out a section of it, as shown here in Plaintiff's exhibit No. 1, resulting in an opening as shown in Plaintiff's exhibit No. 3, and the air outside here, prior to the removal of this object here, was 52 degrees, would the meeting of those two airs at different temperatures cause any foreign—any substance at all to be deposited in the area shown here. And I will mark this.

A. Use my pen.

Q. All right, mark it L-1."

* * * * * * *

"The Court. All right, now you can answer the question.

The Witness. It would cause, as the temperature dropped, an immediate temperature drop and precipitation of moisture here. You have a difference of 10 degrees below, there's 52 degrees here. I would say that there would be an immediate temperature drop to below 32, causing, as she dropped, precipitation of moisture from the atmosphere, then freezing of such moisture at that point." (196, 197)

The testimony of the above witnesses was thus to the effect that on the night respondent Williams was injured there was frost on the hatch coaming in the vicinity of the ladder (the word "iron" used by Hall meant the coaming) and expert testimony that this was a natural and usual physical phenomenon.

The testimony of the expert was not patently in error, as contended by petitioner in its brief, page 27. Moisture from the air will condense any time the temperature of the air is cooled below its dew point. It is true that the temperature of the hatch coaming, being in the outer air, was higher than the temperature of the air in hold, but when the cold

air from the hold contacted the warmer hatch coaming it cooled it to a temperature below the dew point of the air surrounding the hatch coaming.

The only direct evidence introduced on the question of the frost was the testimony of the eye witness quoted above who testified that on the night respondent Williams was injured, he himself saw frost on the pertinent area. The testimony of an engineer, referred to by petitioner on page 28 of its brief, was not direct testimony at all. As petitioner admits, this engineer testified only as to what he found to have happened long after the injury under what he considered to have been circumstances similar to those existing when the injury took place. This is not direct testimony. It is only testimony from which the jury might have inferred that there was no frost when respondent Williams fell. The jury did not choose to so infer, however, and found adversely to the petitioner, based upon the direct testimony that frost existed and the testimony from which it could reasonably be inferred that the frost existed.*

The only direct testimony on the question of frost tended to establish the presence of the frost. Therefore, if the decision in *Penna. R. Co. v. Chamberlain,* supra, applies at all, it must be held to deny that the jury could reasonably have found that no frost existed. Certainly, the verdict of the jury and the decision of the court below was not contrary to the ruling of that case.

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*For another icing case in an allied field, F.E.L.A., where the Court of Appeals for the 9th Circuit resolved factual questions on negligence for the trier of facts, see *Fugazzi v. Southern Pac. Co.*, 208 Fed. 2nd 205 (1953).

CONCLUSION

We have extended this brief to considerable length because we feel it important to show the actual meaning of every case relied upon by the petitioner. This requires a full discussion of each case.

The petition fails to show any reason for granting the writ of certiorari prayed for. An analysis of the questions propounded by the petition and the relevant legal materials discloses:

(1) the decision below is not in conflict with any decision of this Court or any other court of appeals;

(2) no right of the litigants actually depends upon any question propounded; and

(3) the questions propounded are not actually reached under the facts of the case.

Therefore, it is respectfully submitted that the petition for writ of certiorari prayed for should be denied.

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